United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2056 original

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

RICHARD PATRICK CARRIGAN and
ROBERT EDWARD WHITE,

Defendant-Appellants

B P/S

Docket No.
74-2056

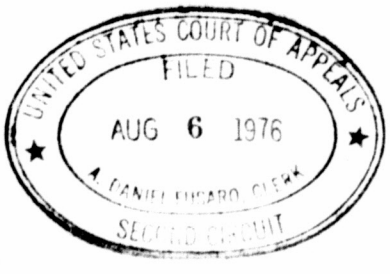
-v-

UNITED STATES OF AMERICA

Appellee.

On Appeal from the United States District Court for the Northern District of New York.

BRIEF OF DEFENDANT-APPELLANT WHITE



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14 Wall Street
New York, New York 10005

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 74-2056

RICHARD PATRICK CARRIGAN and
ROBERT EDWARD WHITE,

Defendant-Appellants, ~~Plaintiffs~~

against

UNITED STATES OF AMERICA,

Appellee.
~~Defendant~~

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

Defendant-Appellant Robert E. White

That on August 6, *19*76 *deponent served the annexed* Brief of Defendant-Appellant White, And Appendix.
on Paul V. French, Esq., Assistant U.S. Attorney, Of Counsel
attorney(s) for Appellee
in this action at Federal Building, Albany, New York
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated August 6, 1976

Thomas McGanney
The name signed must be printed beneath

Thomas McGanney

Attorney at Law

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

Index No.

Plaintiff

against

AFFIDAVIT OF SERVICE BY MAIL

Defendant

STATE OF NEW YORK, COUNTY OF *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

That on *19* *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

The name signed must be printed beneath

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UNITED STATES COURT OF APPEALS

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Preliminary Statement

This is an appeal by defendant White from a judgment of conviction filed July 22, 1974. Defendant Carrigan is also appealing from a judgment of conviction entered the same day.

In an indictment filed March 13, 1974, defendant-appellants were charged with one count of violation of 18 U.S.C. §§2314 and 2. Specifically, defendants were accused of knowingly transporting certain items of leather goods in the value of $37,475.00 in Gloversville, New York, to Haverhill, Massachusetts, subsequent to the theft of those items from a warehouse in New York on March 7, 1974.

Trial before a jury was commenced on June 10, 1974. Both defendants were represented by a single appointed counsel, Armand R. Riccio, Esq. The record demonstrates no inquiry by the trial judge, either prior to or during the trial, as to possible conflicts between the positions of the two defendants. Defendant Carrigan took the stand, but defendant White did not. The jury returned a verdict of guilty against both defendants on June 17, 1974. Both defendants were sentenced to eight years in jail on July 19, 1974, and have been committed since June, 1975.

Issues Presented for Review

1. Should the conviction of defendant White be reversed because the trial judge did not conduct a hearing as to whether there was a potential conflict of interest between the representation of defendant White and the representation of defendant Carrigan by a single assigned counsel?

2. Should the conviction of defendant White be reversed because he was denied the effective assistance of counsel in that his assigned counsel represented a co-defendant with conflicting interests, viz:

(a) the co-defendant took the stand and defendant White did not; and

(b) White's assigned counsel, in commenting on the evidence, adopted the position of defendant Carrigan and attacked White's credibility; and

(c) assigned counsel did not vigorously assert White's position throughout the trial.

3. Should White's conviction be reversed when the evidence against him was susceptible of an alternate innocent explanation and was based on testimony obtained through physical abuse or promises of leniency to the government witnesses?

STATUTE INVOLVED

18 U.S.C. §3006A(b):

> "(b) Appointment of counsel. - In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense, and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The United States magistrate or the court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel or when other good cause is shown. Counsel appointed by the United States magistrate or a judge of the district court shall be selected from a panel of attorneys designated or approved by the district court."

STATEMENT OF THE CASE

A. The Trial - The Government's Case

The trial was short, lasting less than three days and covering approximately 300 pages of transcript. The prosecution called seven witnesses, and the defense called only defendant Carrigan to the stand.

Four of the prosecution witnesses testified to their own involvement in the transaction and sought to implicate the defendants. The first witness, Greenberg, testified that after some preliminary discussions with an unidentified party and then with defendants, he agreed to buy leather goods from them (21-23). Subsequently, he testified that defendant Carrigan called and arranged to meet him with the goods in Haverhill on March 8, 1974 (29-30); that in the course of that meeting, Greenberg arranged the transfer of the goods to the warehouse of Greenberg's acquaintance, Zikos (31-32); and that Greenberg actually paid defendants after cashing two checks made out by Zikos to Greenberg (38).

Zikos, a professional leather dealer, testified to the delivery of the leather goods to his warehouse by Greenberg and defendants (68-69), and to his payment for the goods (71). While Greenberg testified that the goods were obviously stolen (49), Zikos testified, on direct examination by the Government, that there was nothing about the leather that made him suspicious (80). Although they both testified to White's presence during the sale of the goods, neither Greenberg nor Zikos recalled defendant doing much in the way of talking during those transactions:"Bob [White] did very little speaking as I

remember." (25) Neither Greenberg nor Zikos, despite their admitted involvement in the sale of the goods, were charged with any crime.

The two other principal government witnesses, Ragone and Southwick, admitted committing the actual burglary and also actually driving the truck containing the stolen goods from New York to Massachusetts (109-110; 154-156). Both pleaded guilty to state charges of burglary, and federal charges of interstate transportation of stolen goods, and were awaiting sentence at the time of their testimony (97,145). Subsequently, Ragone was sentenced to three years in jail, two and a half years of which were suspended. Southwick was sentenced to six months. Upon subsequent violation of the conditions of his probation, Ragone was returned to prison to serve the balance of his sentence.

Southwick's testimony (Ragone's was to the same effect) placed defendants at the planning stages of the burglary (148-51); also in Massachusetts on the evening of March 7, where the four - Ragone, Southwick, Carrigan and White - supposedly met after the burglary; and at the transfer of the goods to Greenberg and Zikos. It was brought out on cross-examination of Southwick that he had been beaten for twenty minutes - "Kicked in the legs, punched ... in the side and in the ribs below my heart" (162) by the state police before giving a statement implicating Carrigan and White.

Southwick was told, while being beaten: "Come on, tell us about White and Carrigan and we will take care of you." (163)

In addition, the prosecution called four other witnesses who gave testimony peripheral to the actual events. Thus, the government called one Jeanne White (no relation to defendant (137)) who testified that she had seen defendants the evening of the burglary, and that she had allowed them the use of her car (138). The government also called Lawrence Serfis, an employee of M. Frenville Company, which owned the burglarized warehouse. Mr. Serfis' testimony recounted his discovery of the burglary; identification of a package of leather in the possession of Zikos subsequent to the burglary; and identification of an itemized inventory of the stolen items (Government's Exhibit 6). On cross-examination, Mr. Serfis stated that he had no knowledge as to the identity of those who took the inventory from the warehouse, nor did he know the defendant or have any knowledge of any role he might have played in any of the events at issue in the trial. The government also called Albert C. Krup, an employee of Allegheny Airlines, who, pursuant to a subpoena duces tecum, produced airline tickets in the name of defendants for a flight from Boston to Albany on March 8, leaving Boston at 6:27 (85).

The government's final witness was DuMaine, an FBI Special Agent, who had arrested White on March 9, 1974, in

Schenectady, New York (181). DuMaine testified that after advising White of his rights, he asked White some questions. White denied any involvement in the burglary and told DuMaine that he had been in Schenectady or Albany on the evening of March 7 and all day on March 8 (184).

With this testimony, the Government rested. Defendants' counsel stated he had no motions to make (189). The Court replied: "I think perhaps you should make one for the record." (189) Counsel complied with a one-sentence motion which was denied. (189-190).

B. The Trial - Defendants' Case

Although he had suggested to the jury in his opening that both defendants might take the stand (15), defense counsel actually called only Carrigan.

Carrigan's testimony was to the effect that he had no knowledge that the goods were stolen and did not participate in their interstate transportation, but only received them in Massachusetts. In detail, however, Carrigan's story on the witness stand was in direct conflict with White's "statement" as related by Agent DuMaine. Carrigan implicated White in the transaction from the initial meeting with Greenberg (193) through their subsequent sale. Carrigan testified that he and White met Ragone and Southwick in Massachusetts the evening of March 7 (200-201) and that the next day all four met Greenberg and arranged the sale of the goods (202-03). Carrigan testified that he and White then flew back to Albany

from Boston (210); thus totally contradicting White's testimony that he had not been out of Schenectady.

C. The Trial - Summations and Charge

On summation, defendants' counsel was faced with a substantial conflict of interest between his two clients, for to argue to the jury Carrigan's version of the events would place White in Haverhill on March 8, directly contradicting White's statement to Agent DuMaine that in fact he had been in the Albany-Schenectady area on the day in question. Defense counsel chose, however, to support Carrigan's version. Not a word was mentioned in his summation about White's statement or his claim of total non-involvement in the transaction. Instead defense counsel stated directly to the jury:

> "... I think it is significant Mr. Carrigan got on the stand and he didn't say to you 'We don't know anything with reference to this matter.'" (253-254)

And later:

> "Now as you all know there is no obligation on the part of the defendants to take the stand, so one did and one didn't, but I would say this to you, the fact Mr. Carrigan did take the stand is significant. I think what he had to tell us is significant." (256)

And still further:

> "... I say on the evidence here before you, the inference can be drawn that it is as Mr. Carrigan described, that he was merely -- he and White were merely entrusted with unloading this load of leather, finding a buyer...." (257)

At several other places, defense counsel admitted White's complicity in the sale of the goods in Massachusetts (259, 261, 265 (twice)), and contrary to White's statement, further accepted the Allegheny agent's testimony - "well, we never denied we took the plane." (261) Not one word in support of White's credibility was uttered.

In contrast, the government's summation, while occupying only 6 pages of transcript, spent approximately one-third of its time (271-272) dealing with White's statement, and attacking his credibility. After referring to White's statement to the FBI agent and the evidence of the plane tickets indicating that White took a plane from Boston on March 8, the prosecutor stated that"[t]hese are just some of the minor inconsistencies that were brought out through Mr. Carrigan by Mr. Riccio.(271)It was these "minor inconsistencies", not rebutted by White's own counsel but in fact confirmed by him either directly or by his silence, which made White's conviction inevitable.

Defense counsel took no exceptions to the charge. Prior to giving the charge, Judge MacMahon took the initiative to ask counsel whether he wanted a charge with respect to White's not taking the stand. Counsel replied: "If you would, I would appreciate it."

The jury returned a verdict of guilty on June 17, 1974.

D. Sentencing and Subsequent Proceedings

Sentencing took place before Judge MacMahon on July 19, 1974. While assigned counsel appeared for both parties, he said in Mr. White's behalf only: "Once again, I am quite confident the Court will impose a just sentence." (S.6) The Court imposed a sentence of eight years, after stating that White was "heavily implicated in this very serious crime and you also have an extensive criminal record." After sentencing, defense counsel moved that bail be set. In light of defendant's compliance with the terms of their earlier bail, including their appearance at the trial itself, the motion was granted and bail set at $20,000 for each, pending appeal of the conviction. Notice of their appeals were filed on July 19, 1974 and bonds were posted for each defendant on July 26, 1974. On November 23, 1975, Charles A. Ryan, Esq., who was retained to represent defendants on appeal and paid the sum of $2,800, was substituted as counsel by stipulation. This court then entered an order dated March 4, 1975 extending the deadline for the filing of the briefs of the defendants until March 7, 1975. The briefs were not filed by that date and this Court then ordered the dismissal of the appeal. Defendants' bail was then revoked on April 18, 1975, on motion by the government. Defendant White was then committed to the Federal penitentiary in Atlanta. On June 22, 1976, upon motion by defendants, based on their statement that they were not responsible for their counsel's delinquency in filing

necessary papers, the Court reinstated the appeal and appointed instant counsel for defendant White.

ARGUMENT

I.

DEFENDANT WHITE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF THE CONFLICTING INTEREST BETWEEN HIM AND HIS CO-DEFENDANT

Armand Riccio, Esq. was assigned to represent both Carrigan and White under 18 U.S.C. §3006A. There is no record of a preliminary hearing or inquiry by the judge as to possible conflicting interests. The statute provides inter alia:

> "The United States magistrate or the court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel, or when other good cause is shown." 18 U.S.C. §3006A(b).

The statute embodies a policy enunciated 25 years ago by the United States Supreme Court in United States v. Glasser, 315 U.S. 60 (1942), reversing a conviction for conspiracy to defraud the United States because a trial court had appointed the defendant's lawyer to represent a co-defendant in the same proceeding. The Court held:

> "... so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall

> simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." 315 U.S. at 70.

The Second Circuit has dealt with this question in several recent cases, commencing with Morgan v. United States, 396 F. 2d 110 (2d Cir. 1968). In Morgan, the court remanded for a determination whether the defendant had been provided with adequate assistance of counsel where his attorney had withdrawn before trial and the court had substituted in the first attorney's place his co-defendant's counsel. In an opinion by Chief Judge Lumbard, the court stated:

> "This case makes it abundantly clear that district courts should exercise extreme care before the court assigns any counsel already representing a defendant to represent one or more other defendants who face the same charges. Despite what the appearances may be before trial, the possibility of a conflict of interest between two defendants is almost always present to some degree even if it be only in such a minor matter as the manner in which their defense is presented. This is so especially where there is a question as to whether either or both of the defendants should take the stand. This kind of decision, difficult enough where two defendants at the same trial are represented by different counsel, is made doubly difficult where they are represented by the same counsel. The decision whether a defendant should testify may be unduly affected by the risk that his testimony may develop so as to disclose matters which are harmful to the other defendant or which conflict with the other defendant's story. The attorney's freedom to cross-examine one defendant on behalf of another will be restricted where the attorney represents both defendants. And if, where two defendants are represented by the same attorney, one defendant elects to take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the stand is almost inescapable." (396 F. 2d at 114) (Emphasis supplied.)

Another significant recent case is United States v.

Olsen, 453 F. 2d 612 (2d Cir. 1972), where three appellants were jointly represented by a single attorney, also appointed under 18 U.S.C. §3006A, in a trial to the court. The conviction of appellant Olsen was reversed and remanded for a new trial, after the attention of the Court of Appeals was brought to counsel's comments on summation of the issue of probable cause for arrest - that is, that the case for the other defendants "is even stronger" than it was for Olsen and that "There may be some reason for the arrest of Harold Olsen"/ (Id.at 616). While the court did not conclude that there in fact had been prejudice to Olsen, it remanded because of the "possibility" that such prejudice had occurred. (Ibid) These comments bear a strong resemblance to Mr. Riccio's comments regarding the "significance" of Carrigan taking the stand, and his defense of Carrigan's credibility to the detriment of White's. Moreover, in the instant case, such argument was made to a jury, not as in Olsen, to the Court.

Also in point is United States v. DeBerry, 487 F. 2d 448 (2d Cir. 1973). In that case, judgment of conviction of both defendants was reversed because of the potential conflicts inherent in a joint defense. DeBerry further strengthened the principle enunciated in Morgan in that counsel there was retained voluntarily by the co-defendants rather than being appointed under 18 U.S.C. §3006A. See also United States v. Bernstein, 533 F. 2d 775, 788 (2d Cir. 1976).

The DeBerry Court stressed the need for the trial court to conduct a hearing to determine possible conflict, particularly where a crucial problem in the case was whether each defendant would take the stand. (Id. at 453) The Court was not satisfied with defense counsel's assurances of having explored the problem with her clients; as Judge Oakes stated, "This is quite another thing, however, from the court's interrogating the individual defendants themselves." (Ibid)

In United States v. Alberti, 470 F. 2d 878 (2d Cir. 1972), cert. denied 411 U.S. 919 (1973),the Court reiterated the procedure first stated in Morgan, but totally ignored here:

> "Where the trial judge assigns the same attorney to represent two or more defendants, he should do so only after conducting a most careful inquiry, as to which a full record should be made, and after satisfying himself that no conflict of interest is likely to result and that parties involved have no valid objection." 470 F. 2d at 881.

The instant case is a classic example of conflicting interests. To begin with, this was a jury case and there was the crucial decision to take the stand or not to take the stand. While the possible testimony of both defendants was promised to the jury, only one - Carrigan - did testify. What Chief Judge Lumbard referred to in Morgan as "almost inescapable" prejudice was not avoided here.

To make matters worse, what Carrigan testified to contradicted the only statement of defendant White presented to the jury - that is, the statement to Agent Dumaine. When

the time came for summation, defense counsel chose to ignore White's statement and argue only Carrigan's story to the jury. Thus, no one took White's part before the jury, and indeed his very own attorney, by supporting Carrigan's version, in effect made him out to be a liar.

There is no indication on the record that either defense counsel or the trial judge perceived this problem. Instead of conducting "the most careful inquiry", the court below totally ignored the problem.

Finally, the trial record demonstrates failure on the part of defense counsel to participate vigorously on behalf of White in other respects - the failure to move to dismiss, the failure to press his case on summation, the failure to request a charge regarding White's not taking the stand, and the total abnegation of advocacy in White's behalf at the sentencing. While the trial court, in the interest of preserving the record, made up for some of those deficiencies, the net result was conviction and the severe sentence of eight years for a crime for which the actual perpetrators received six months.

All in all, White lacked the effective assistance of counsel, guaranteed by the Sixth Amendment, in the court below.

II.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION.

The United States Supreme Court has stated that:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. 358, 364 (1970).

The Government's case consisted principally of seven testimonial witnesses, four of whom were, by their own admission, participants in the illegal events. The testimony of the four participants other than defendant in the series of events constituting the theft, interstate movement, and sale of the leather goods presents an internally inconsistent and often elusive story that in sum is highly prejudicial to the defendant, yet when its separate parts are examined leaves many unanswered questions. Since each of the four testimonial witnesses - two of whom were awaiting sentencing - admitted their own participation in the transaction, there was clearly a strong incentive to minimize their own roles while portraying defendant and Carrigan as the organizers and moving forces behind the efforts. Little evidence was adduced of White's active participation in the transaction. No one claimed that he burglarized the leather company or drove the truck carrying the goods across state lines. Neither Greenberg nor Zikos could recall much, if anything, actually said by White, either in the planning stage (26) or at the selling stage (63). At the same time, Zikos, an experienced leather dealer, testified that from inspection of the goods themselves,

one could not determine that they were stolen (77).

This Court stated in United States v. Tannuzzo,174 F. 2d 177 (2d Cir. 1949), cert.denied 338 U.S. 815, that in order to convict under 18 U.S.C. §2314, it is necessary that the government prove "that the defendant knew that the goods were stolen and that they were in fact transported in interstate commerce". 174 F. 2d at 180. In United States v. Infanti, 474 F. 2d 522 (2d Cir. 1973), the Court held that there was not sufficient proof to sustain the conviction under 18 U.S.C. §2314 where the government did not adequately show that defendant knew the securities were stolen:

> "It is true that the circumstances of the proposed stock transfer were surreptitious and it would have been obvious to [the defendant], a lawyer, that Infanti's dealings were less than legitimate. But Kurtz's presence in the hotel room and the lack of evidence of his participation in the conversations that occurred there ... do not establish the conclusion beyond a reasonable doubt that he was aware that the securities were stolen .... Without some further evidence of the quality of his participation, Kurtz's presence where illegal activity was being transacted does not establish his knowledge of the nature of his activity." 474 F. 2d at 523

In the trial of this case below, a reasonable alternate explanation of defendant's activities and state of mind was offered: that defendant had merely been present as Carrigan responded to the request of Ragone to find a buyer for some leather goods, that at Woods' suggestion, Carrigan

contacted Greenberg and arranged that he and Ragone connect for purposes of a business transaction about which White knew little. The evidence offered by the Government to support a conclusion that White in fact knew that the goods were stolen does not meet the standard of United States v. Wright, 450 F. 2d 992 (2d Cir. 1971), where this Court stated that:

> "... in examining the evidence to determine whether it is substantial for purposes under consideration, it must do more than merely raise a suspicion of the facts sought to be proved; there must be more established than a mere suspicion of guilt...." 450 F. 2d at 994

Further substantial deficiencies were present in the Government's case. Thus, the almost exclusive reliance by the Government upon the testimony of accomplices who have either pleaded guilty to a lesser charge and are awaiting sentencing or are threatened with criminal responsibility for their own acts should not be sufficient to carry the Government's burden of proof beyond a reasonable doubt. As long ago as 1917, the U.S. Supreme Court stated that the

> "...better practice [is] for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence." Caminetti v. United States, 242 U.S. 470, 495 (1971).

Although there is no firm rule prohibiting a conviction based on the testimony of accomplices, such convictions usually have been upheld on the basis of explicit cautionary instructions

by the court in its charge to the jury that such testimony by accomplices be closely scrutinized. United States v. Rainone, 192 F. 2d 860 (2d Cir.,1952); United States v. Tarricone, 242 F. 2d 555 (2d Cir.,1957). In the case at bar, the court's instructions were insufficient on this point. While the phrase "special care and act upon it with caution" does appear at one point (278), it is followed by a much longer exposition to the jury on the need of the Government to use accomplices to "detect and prosecute wrongdoers" (278), and on the need to balance the accomplice testimony against the possible biases of the witnesses. Where the government seeks to rely virtually exclusively on the testimony of accomplices, greater force should be read into the language this Court used in United States v. Insana, 423 F. 2d 1165 (1970) that

> "... the judge instruct the jury that in weighing the testimony of such witnesses they give adequate attention to the motives which may underlie such testimony. 423 F. 2d at 1169

The mere pro forma inclusion of a phrase with the words "special care" should not be sufficient to meet this standard in a federal felony prosecution where there is no other significant evidence to corroborate the accomplices' testimony.

Even more compelling in the present case is the fact that the testimony of one of the prosecution's principal

witnesses, Southwick, was obtained only after he had first been beaten and otherwise abused by the New York State Police after being taken into custody for interrogation. During the trial, Southwick testified:

> "Q. And did you tell Mr. Carrigan that, or give him the impression that you incriminated him and Mr. White in this affair and made him think that the reason you implicated him was that the police made you do it by force?
>
> A. I was beaten and then made the statement.
>
> Q. Did you make the statement before you were beaten?
>
> A. No, sir.
>
> Q. What did they do to you?
>
> A. Kicked me in the legs, punched me in the side and in the ribs below my heart.
>
> Q. How long did they do that?
>
> A. Twenty minutes.
>
> Q. And it was after this manhandling for twenty minutes, that you gave a statement?
>
> A. Well, I stood it for a half hour and then I gave the statement ....
>
> Q. Didn't the police tell you, 'Come on, tell us about White & Carrigan and we will take care of you?'
>
> A. Yes.
>
> Q. And when you wouldn't implicate Mr. Carrigan and Mr. White, they beat you?
>
> A. Yes, sir."(162-3)

On redirect, Southwick gave further details of his treatment at the hands of the State Police after his arrival at the Trooper's barracks:

> "Q. Tell us what Jack Brandt [a state trooper] did to you?
>
> A. Pulled my hair, sat on my stomach. Sat me in a chair and was pulling my hair, punching me in the ribs and face, kicking me in the leg.
>
> Q. Did you seek any medical attention?
>
> A. No, I didn't.
>
> Q. Was there any conversation going on at the time of this pulling of the hair and kicking in the leg?
>
> A. Yes, he was asking me questions and I cold him I didn't want to answer any questions, I wanted to speak to a lawyer, but they didn't let me." (174-5)

Although Southwick stated at the trial that he was not then testifying under any coercion or duress, that his statements given after being beaten and abused were true, and that he continued to stand by them, it is nonetheless apparent from his testimony that the beating was the sine qua non of his role as a witness, and that once having started implicating himself and others, including the defendant, to the police he had no choice apparent to him other than to continue talking and cooperating with the authorities in an attempt to minimize his own responsibility.

The inadmissibility of a confession obtained under the circumstances in which Southwick testimony was forceably extracted from him is well settled. Davis v. North Carolina, 384 U.S. 737 (1966); Chambers v. Florida, 309 U.S. 227 (1940). In Chambers the U.S. Supreme Court was unequivocal on the obligation of the judiciary to protect the

citizenry from police lawlessness:

> "From the popular hatred and abhorrence of illegal ... confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as a criminal punishment for a violation of that law until there had been a charge fairly made and fairly tried in a public tribunal ...." 309 U.S. at 236-7
>
> "We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawlessness irrespective of the end." 309 U.S. at 240-41

The truth or falsity of the extracted self-incriminating statements is immaterial. Rogers v. Richmond, 365 U.S. 534 (1961).

> "This is so not because such confessions are unlikely to be true, but because the methods used to extract them offended an underlying principal in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitional system." 365 U.S. at 541

It is true that this Court in United States ex rel. Portelli v. LaVallee, 469 F. 2d 1239 (1972), affirmed the LaVallee dismissal by the United States District Court for the Northern District of New York of a petition for a writ of habeas corpus after the New York Court of Appeals had upheld the admissibility of the testimony of a witness given 8 months after his original statement had been extracted by force. Portelli, however, should not be controlling here in that the District Court's

dismissal followed a decision of the highest court of the State of New York, and should thus be read in light of normal deference to State court autonomy in such evidentiary matters short of outright constitutional violations. This is not the case here, however, where this Court is asked to exercise its normal supervisory function over the Federal Courts within this Circuit.

> "Except when an Act of Congress or the rules themselves otherwise provide, the Courts are left free to develop evidence rules for criminal cases as reason and experience dictate. The purpose is to develop a uniform law of evidence to be applied in Federal criminal cases, and State rules of evidence are not controlling." Wright, Federal Practice and Procedure: Criminal §402.

If Portelli is thus seen as a matter of Federal deference to State evidence laws in habeas corpus petitions short of actual unconstitutionality, the admissibility of Southwick's testimony against the defendant comes to this Court as a matter of first impression. As such, this Court should adopt a rule excluding testimony in Federal prosecutions where the testimony is clearly the product of illegal police procedure.

CONCLUSION

The judgment of conviction below should be reversed. The indictment should be dismissed or, in the alternative,

defendant should be granted a new trial with separate counsel.

Dated: New York, New York
August 4, 1976

Respectfully submitted,

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